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Supreme Court, U.S.
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No. 98-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DaimlerChrysler Corporation,

Petitioner,

v.

Kolosso Auto Sales, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, Kolosso Auto Sales, Inc., states that it has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Since 1937, Wisconsin has regulated the franchise agreements of motor vehicle manufacturers and their dealers under the Wisconsin Motor Vehicle Dealer Law ("WMVDL"), § 218.01, Wis. Stats. This regulation exists "in recognition of the gross disparity of bargaining power between the manufacturer of automobiles and the local retailer" and "the long history of the abuse of dealers by manufacturers." *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 85, 138 N.W.2d 214, 217-18 (1965). *See also New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978) ("[t]he disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers").

In 1988, the petitioner, DaimlerChrysler Corporation ("Chrysler"), a motor vehicle manufacturer licensed under the WMVDL, entered into franchise agreements (the "Franchise Agreement")[1] for Chrysler's Jeep and Eagle line makes of vehicles with the Respondent, Kolosso Auto Sales, Inc. ("Kolosso"), a licensed motor vehicle dealer in Appleton, Wisconsin. The Franchise Agreement was for an indefinite term. However, Chrysler reserved for itself the right to unilaterally amend the Franchise Agreement where "the passage of time, changes in the industry, ways of doing business

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[1] Chrysler and Kolosso signed two separate Sales and Service Agreements, one for Jeep vehicles and the other for Eagle vehicles, which were otherwise identical. Both agreements are referred to in this brief as the "Franchise Agreement."

and other unforeseen circumstances" caused it to determine that it should.

The Franchise Agreement contained, among others, a provision that required Kolosso to obtain Chrysler's prior written approval before changing the location or the use of Kolosso's dealership facility. However, when Chrysler entered into the Franchise Agreement, it knew that, as a motor vehicle manufacturer licensed in Wisconsin, its franchise agreements with dealers such as Kolosso would be subject to extensive regulation by the State of Wisconsin under the WMVDL, including regulation of Chrysler's contractual right to approve the location and use of Kolosso's facilities.

This knowledge resulted from Chrysler's having obtained a license to act as a motor vehicle manufacturer license in Wisconsin, thereby subjecting itself "to all provisions of the Wisconsin statutes regulating manufacturers, importers and distributors." § 218.01(2)(bd)3 (1985-86).[2] As of 1988, these provisions included:

1. The power of the licensing agency to "define unfair practices in the motor vehicle industry and trade between licensees . . . ." § 218.01(5)(a) (1985-86).

2. The prohibition against "[b]eing a manufacturer . . . who has attempted to induce or coerce, or has induced or coerced, any automobile dealer to enter into any agreement with such manufacturer . . . or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer . . . and said dealer" § 218.01(3)(a)16 (1985-86).

---

[2] Applicable provisions of the WMVDL in effect when the Franchise Agreement was entered into are reproduced in the Appendix to this brief.

3. The prohibition against "[b]eing a manufacturer . . . who has unfairly, without due regard to the equities of said dealer and without just provocation, canceled . . . the franchise of any motor vehicle dealer." § 218.01(3)(a)17 (1985-86).

4. The prohibition against "[h]aving indulged in any unconscionable practice relating to said business." § 218.01(3)(a)11 (1985-86).

5. The prohibition against "[h]aving violated any law relating to the sale, distribution or financing of motor vehicles." § 218.01(3)(a)14 (1985-86).

6. The prohibition against "[b]eing a manufacturer . . . who unreasonably withholds its approval of a change of ownership or executive management of a dealership," § 218.01(3)(a)23 (1985-86).

7. The prohibition against "[b]eing a manufacturer . . . who unreasonably closes a dealer point." § 218.01(3)(a)24 (1985-85).

8. Provisions regulating the rights of "designated family members" of a deceased or incapacitated dealer to succeed to the ownership and operation of the dealership under an existing franchise agreement. § 218.01(3)(a)26 (1985-86).

9. A procedure under which the licensing agency could prevent a manufacturer from *relocating* or establishing a dealer in another existing dealer's relevant market area upon a showing of "good cause" for not permitting the relocation or establishment. §§ 218.01(3)(a)32, (3)(f)1 (1985-86).

10. A prohibition against "[b]eing a manufacturer . . . who unreasonably refuses to allow a dealership to

share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86).

In 1993, the Wisconsin Legislature amended the WMVDL to, among other things, create § 218.01(3x).[3] This subsection established an explicit procedure for resolving disputes regarding a manufacturer's refusal to allow a dealer to "change its ownership or executive management, transfer its dealership assets to another person, add another franchise at the same location as its existing franchise or relocate a franchise . . . ." § 218.01(3x)(b)1. The procedure in § 218.01(3x) permits the State of Wisconsin, acting through its agency, the Division of Hearings and Appeals ("Division"), to allow a dealer to undertake one or more of these proposed actions where, after considering the interests of the manufacturer, the dealer, other dealers and the public,[4]

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[3] Section 218.01(3x) is reproduced in Appendix E (App. 45a-48a) to the Petition.

[4] The factors specified in the statute to be considered by the Division in determining whether "good cause" exists are:

> a. The reasons for the proposed action.
>
> b. The [manufacturer's] reasons for not approving the proposed action.
>
> c. The degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment.
>
> d. Whether the proposed action is in the public interest.

(continued...)

the Division determines that there is "good cause" to permit the proposed action. Until such a determination is obtained, the dealer is prohibited by the statute from undertaking any of the listed actions without the manufacturer's approval as required by the franchise agreement. § 218.01(3x)(b)1.

Section 218.01(3x) replaced the prohibitions against "[b]eing a manufacturer . . . who unreasonably withholds its approval of a change of ownership or executive management of a dealership," § 218.01(3)(a)23 (1985-86), and "[b]eing a manufacturer . . . who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86), which had been in effect prior to 1988. These changes were made applicable to franchise agreements that existed prior to their effective date, as well as to those entered into after the effective date.

Kolosso sought to invoke § 218.01(3x) in 1995, after Chrysler had rejected its request to allow Kolosso to relocate its Jeep-Eagle dealership "to another address in Appleton in order to enable it to consolidate the service facilities of its Chrysler dealership with the service

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[4] (...continued)

> e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the [manufacturer].
>
> f. The impact of the proposed action on other motor vehicle dealers.

§ 218.01(3x)(c)1. a. - f.

facilities of a Toyota dealership that it owned at that address." App. 2a. After Kolosso filed a Complaint with the Division under § 218.01(3x) challenging Chrysler's disapproval of this proposed action, Chrysler commenced the underlying suit in the United States District Court for the Eastern District of Wisconsin. Chrysler's suit sought a declaratory judgment that the application of § 218.01(3x) to Kolosso's proposal violates the Contracts Clause of the United States Constitution. By agreement of the parties, the proceedings on Kolosso's Complaint under § 218.01(3x) have been stayed pending the completion of this action.

The District Court held that the application of § 218.01(3x) to Kolosso's proposal does not contravene the Contracts Clause. App. 12a-19a. Chrysler appealed that decision to the Seventh Circuit, which affirmed. App. 1a-11a.

CHRYSLER'S MISSTATEMENTS OF FACT OR LAW

Kolosso disputes several statements of fact or law made in the petition, including:

1. At page 1 of the petition, Chrysler states that, prior to the Wisconsin Legislature's enactment of § 218.01(3x) in 1993, "the State of Wisconsin had never regulated the location of automobile dealerships . . . ." This statement is contradicted by several provisions of the WMVDL which existed before 1988 when Chrysler signed the Franchise Agreement with Kolosso, including: §§ 218.01(2)(e), (3)(bf)1 (1985-86), which required licensed dealers to own a vehicle display lot and per-

manent facilities for display of vehicles and required that the location of such facilities be specified in the dealers' licenses issued by the licensor; § 218.01(2a) (1985-86), which required that, before changing its location, the dealer notify the licensor and apply for an amended license; §§ 218.01(3)(a)32, (3)(f) (1985-86), which prohibited manufacturers from relocating a motor vehicle dealership within the "relevant market area" of an existing enfranchised dealer of the same line make of vehicle without first notifying that dealer and providing it 30 days to protest the relocation with the licensing agency; § 218.01(3)(a)17, which prohibited a manufacturer from terminating a dealer's franchise for, among other things, relocating without the manufacturer's approval if the manufacturer's withholding of such approval was not "just and fair" enforcement of the franchise agreement;[5] and § 218.01(3x), which prohibited manufacturers from unreasonably refusing "to allow a dealership to share its facilities with another . . . ."[6]

2. At page 5 of the petition, Chrysler states that "Chrysler denied Kolosso's request, because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles." The reasons for Chrysler's denial of Kolosso's request have not yet been litigated or determined by any court or administrative agency. Kolosso contends that Chrysler's opposition to

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[5] See further discussion below under Section II.A.

[6] See further discussion below under Section II.A. regarding why § 218.01(3)(a)26m (1985-86) would likely have been construed to apply to a proposal to change a dealership's location in order to share facilities with another dealership.

Kolosso's proposal has more to do with Kolosso's intention to share service facilities with Toyota and Chrysler's desire to force Kolosso to sell its Jeep-Eagle dealership to the local Chrysler-Plymouth dealer, than with any perceived advantages of Kolosso's existing location. App. 27a.

3. At several places in the petition, Chrysler contends that the Seventh Circuit has held that no "police power justification" is required for § 218.01(3x). This is a misstatement of the Seventh Circuit's analysis for the reasons set forth in Section I.A. below.

4. The petition also infers that there is no "police power justification" for § 218.01(3x). This is a misstatement of law and fact for the reasons set forth in Section I.C. below.

5. The petition states that the Seventh Circuit's decision creates a conflict in the circuits with the Eighth Circuit's decision in *Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994), over when contractual impairments are foreseeable. For the reasons set forth in Section II below, this statement is incorrect because the prior regulation of the franchise relationships involved in *Holiday Inns Franchising*, which was virtually nonexistent, was fundamentally different from the WMVDL's prior regulation of motor vehicle franchise agreements such as the agreement in this case.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS

A. Chrysler Misstates the Seventh Circuit's Decision

Chrysler argues that the Seventh Circuit's decision conflicts with this Court's precedents by holding that "*no* state police power justification is required, as long as a court can characterize the resulting burden as a 'small step.'" Petition at 13 (emphasis in original). It further argues that "[t]he Seventh Circuit acknowledged that the amended Dealer Act 'could not be "sustained as an exercise of the police power"' . . . ." *Id.*

The truth is that the Seventh Circuit's decision does not address the issues of whether a state police power justification is required for a statute retroactively applied to an existing contract and whether the statute retroactively applied here was in exercise of the State's police power. The phrase "police power" does not appear anywhere in the Seventh Circuit's decision. Instead, after concluding that the subject regulation was not a substantial impairment of Chrysler's preexisting contract rights, the Seventh Circuit merely restated what this Court has often held—that insubstantial or minor impairments of contract rights do not require "a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

In its analysis of the Seventh Circuit's decision, Chrysler confuses a State's exercise of its police power,

which is required for any state's economic regulation, whether prospective or retroactive, under the Fourteenth Amendment to the United States Constitution, *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992), with the special justification that must exist in order for the State to *substantially impair* an existing contract right under the Contracts Clause. In discussing justification for the subject regulation here, the Seventh Circuit was clearly addressing the latter form of justification, which it correctly held is not required in this case because the contract impairment is not substantial.[7]

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[7] If justification beyond the requisite exercise of the State's police power were required in this case, it does exist. First, the Seventh Circuit's decision concludes that "the 1993 amendment in effect regularized a gray area in the dealership law." App. 9a. Clarification of the existing law is, in itself, sufficient justification for the insubstantial impairment that exists here. Second, the amendment deals with critical issues of motor vehicle facility locations and use, in which the public, in addition to dealers and manufacturers, has an important interest. The public has an obvious and substantial interest in the convenient location of motor vehicle dealer facilities and in the efficient use of those facilities, which may result from sharing of facilities by dealerships to avoid excess capacity and to achieve overhead cost savings that may be passed through to car buyers and owners as retail price reductions. For this reason, § 218.01(3x)(c)1.d specifies "[w]hether the proposed action is in the public interest" as one of the factors to be considered by the Division in determining whether there is "good cause" to allow a dealer relocation and facility sharing proposal to be undertaken.

B. The Seventh Circuit's Decision Correctly Applies this Court's Precedents

The Seventh Circuit's determination that no special justification, beyond the "police power" justification required for all State regulation of private contracts, is required for minor impairments of contract rights, is consistent with this Court's precedents.

In *Energy Reserves*, this Court stated that, in determining if a state regulation violates the Contract Clause, "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). It then is stated that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id.* at 411-12 (citation omitted).

In *Allied Structural Steel*, the threshold test was stated as follows:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations may end the inquiry at its first stage.* Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 244-45 (emphasis supplied) (footnotes omitted).

Also, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986), this Court indicated that inquiry into the justifications for the impairment is required only if a substantial impairment is found.

> We agree that the statute operates as "a substantial impairment of a contractual relationship," and therefore proceed to the asserted justifications for the impairment.

(Citation omitted.)

The Seventh Circuit's decision correctly applies this Court's precedents. Because the challenged regulation was found not to operate as a substantial impairment of a contractual relationship, the Seventh Circuit did not need to inquire into the justification for the impairment. The statement in the Seventh Circuit's decision that "little, predictable impairments . . . don't have to be justified at all," App. 9a, is nothing more than a paraphrase of this Court's statement that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *Allied Structural Steel*, 438 U.S. at 245.

The Seventh Circuit did not hold, as Chrysler asserts, that the regulation did not need to be sustained as an exercise of the police power or that the regulation could not be so sustained. No argument that the regulation in question is beyond the scope of the State of Wisconsin's police power to regulate private contract relations was made to the Seventh Circuit or the District Court in this case. Under prior judicial precedents, which are discussed in the next section of this brief, it was implicitly assumed that the State's regulation of franchise relationships to protect the franchisee from abuse of the

franchisor's superior bargaining power is an appropriate exercise of the State's police power.

C. The Subject Regulation Is Justified As A Proper Exercise of the State's Police Power

The regulation challenged in this case is clearly a proper exercise of Wisconsin's police power under this Court's and other judicial precedent. Motor vehicle franchise regulation has been adopted by Congress and by many states, and the purpose of such regulation has been frequently articulated by the courts. For example, in holding that a California statute governing the establishment or relocation of new motor vehicle dealerships did not violate manufacturers' due process rights under the Fourteenth Amendment, this Court has observed that:

> The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100-01 (1978).

In *Orrin W. Fox*, this Court supported its statement of the purpose underlying motor vehicle franchise legislation by quoting from a Congressional Committee report, which included the following passage:

> This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These

> rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature.
>
> Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.

Id. at 100 n.4.

In *Orrin W. Fox*, this Court also cited the Wisconsin Supreme Court's decision in *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) "[f]or a helpful discussion of the purpose served by such laws—the promotion of fair dealing and the protection of small business." *Id.* at 102 n.7. In *Forest Home Dodge*, the state Supreme Court described the purpose of the WMVDL, in which the regulation challenged here is included, as follows:

> Implicit in this law is the recognition of the gross disparity of bargaining power between the

> manufacturer of automobiles and the local retailer. It was enacted in recognition of the long history of the abuse of dealers by manufacturers. *Kuhl Motor Co. v. Ford Motor Co.* (1955), 270 Wis. 488, 71 N.W.2d 420. These laws deal with the relationship between auto manufacturers and auto dealers. *The purpose of the law is to furnish the dealer with some protection against unfair treatment by the manufacturer.*

Forest Home Dodge, 29 Wis. 2d at 85, 138 N.W.2d at 217-18 (emphasis supplied).

This purpose underlying the WMVDL has been often repeated in state and federal court decisions that have applied the statute. *See American Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1389 (7th Cir. 1995); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 794 (7th Cir. 1989); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 433-34, 405 N.W.2d 354, 369 (Ct. App. 1987); *Department of Transp. v. Transportation Comm'n*, 111 Wis. 2d 80, 94-95, 330 N.W.2d 159, 165-66 (1983); *Nagle Motors, Inc. v. Volkswagen N.C. Distributor*, 51 Wis. 2d 413, 423, 187 N.W.2d 374, 381 (1971).

By enacting the challenged regulation in this case, the Wisconsin Legislature has chosen to protect Wisconsin motor vehicle dealers from unfair treatment with respect to dealer relocation and facility sharing proposals by allowing dealers, who are denied manufacturer approval, to seek an order from the Division allowing their proposals to be implemented, if a determination is made that there is "good cause" for the change. § 218.01(3x)(c). The "courts should 'properly defer to

[the Legislature's] judgment as to the necessity and reasonableness of [this] particular measure.'" *Keystone Bituminous Coal*, 480 U.S. at 505 (quoted source omitted).

The regulation of contract relationships to protect the party with unequal bargaining power has so often been held to fall within the exercise of the states' police powers that the issue is no longer debatable. In rejecting the manufacturer's due process attack on the California statute in *Orrin W. Fox*, this Court held:

> [T]he California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices.

Id. at 107.

Similarly, in *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 502, 71 N.W.2d 420, 427 (1955), the Wisconsin Supreme Court held with respect to the WMVDL:

> It would seem reasonably clear that one of the chief objectives of the legislature in enacting sec. 218.01, Stats., insofar as it seeks to regulate the dealings between automobile manufacturers and dealers, is to promote fair dealing, which, of course, is a legitimate exercise of police power.

Because the challenged regulation here was clearly justified by the exercise of the State's police power and because Chrysler never argued otherwise in the courts below, Chrysler's argument that this case should be heard because there is no state police power justification for the regulation must be rejected.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT IN THE CIRCUITS OVER WHEN CONTRACTUAL IMPAIRMENTS ARE FORESEEABLE

A. The Seventh Circuit's Determination That The Contractual Impairment Here Was Foreseeable Is Justified By Wisconsin's Pervasive Regulation of the Motor Vehicle Franchise Agreements That Already Existed When The Parties' Franchise Agreement Was Formed

The Seventh Circuit's decision correctly concluded that § 218.01(3x) does not substantially impair Chrysler's contractual right to approve the location and use of Kolosso's facility because, in view of the pervasive regulation of motor vehicle franchise agreements by the WMVDL when the Franchise Agreement was entered into, it was foreseeable that a regulation similar to § 218.01(3x) might someday be enacted.

In 1988, when the Franchise Agreement was signed, Chrysler already was prohibited by § 218.01(3)(a)17 (1985-86) of the WMVDL from terminating that agreement without "just provocation" and "due regard to the equities" of the dealer, which the Wisconsin Supreme Court had construed to require manufacturers to be "just and fair in enforcing the terms of the contract" and to make Wisconsin dealers "immune from unreasonable contract terms or the arbitrary, capricious, vengeful enforcement of those terms." *Nagle Motors*, 51 Wis. 2d at 431, 187 N.W.2d at 385. The law also prohibited Chrysler from inducing or coercing a dealer to do any "act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, . . . and said dealer." § 218.01(3)(a)16 (1985-86). Other provisions of the statute gave Kolosso a cause of

action if Chrysler "indulged in any unconscionable practice" or engaged in an "unfair practice." §§ 218.01(3)(a)11, (9)(a) (1985-86).

As noted in the Seventh Circuit's decision, at the time the Franchise Agreement was signed, Chrysler's contractual right to approve the location and use of Kolosso's facility was already restricted by these provisions. App. 7a-8a. Under the law existing then and until the 1993 amendment to the WMVDL, if Chrysler refused to approve Kolosso's proposal to relocate its Jeep-Eagle dealership in order to share facilities with its Toyota dealership, Kolosso could have obtained review of Chrysler's disapproval by the licensing agency through, among other means, relocating and sharing facilities without Chrysler's approval and then defending against the termination of its franchise on the basis that Chrysler had not been "just and fair" in enforcing the contract. §§ 218.01(2)(bd)2, (3)(a)17 (1985-86); *Nagle Motors*, 51 Wis. 2d at 431, 187 N.W.2d at 385.

Also, the WMVDL contained a prohibition against "[b]eing a manufacturer, . . . who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86). Prior to its repeal in 1993, when it was replaced by § 218.01(3x), there was no judicial or administrative determination as to whether § 218.01(3)(a)26m applied to a proposal, such as Kolosso's, where the dealership needed to be relocated in order "to share its facilities with another." However, the Wisconsin Supreme Court has held that the provisions of the WMVDL are to be liberally construed to promote the statutory purpose of

protecting dealers against unfair treatment by manufacturers. *See Department of Transp.*, 111 Wis. 2d at 95, 330 N.W.2d at 166. *See also Bob Willow Motors*, 872 F.2d at 793. In order for two dealerships to begin sharing their facilities, at least one of them would have to relocate. Therefore, a construction of § 218.01(3)(a)26m that limited it to facility sharing proposals *not* involving a dealership relocation would have rendered that statute meaningless.

Accordingly, it is likely that § 218.01(3)(a)26m (1985-86) would have been found to apply to Kolosso's proposal to relocate its Jeep-Eagle dealership in order to share facilities. Prior to 1993, if Chrysler unreasonably refused to allow Kolosso's request to share its Jeep-Eagle dealership facilities with those of its Toyota dealership in violation of § 218.01(3)(a)26m (1985-86), Kolosso could have sought to enjoin the violation pursuant to § 218.01(3)(h) (1985-86) or treble damages under §§ 218.01(3)(a)4, (9)(a), if the violation was "wilful."[8]

The 1993 amendment to the WMVDL merely modified Kolosso's remedies in the event Chrysler refused to approve a Kolosso proposal to relocate and share its facilities. Instead of Kolosso being able to sue Chrysler for treble damages caused by Chrysler's unreasonable refusal to allow Kolosso to share its facilities or Kolosso being able to relocate and share its facilities without Chrysler's approval and to defend a subsequent fran-

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[8] Section 218.01(9)(a) (1985-86) allowed dealer licensees to recover three times the damages caused by a manufacturer licensee's violation of § 218.01(3)(a)4 (1985-86), which prohibited any "[w]ilful failure to comply with any provision of [§ 218.01] . . . ."

chise termination based on § 218.01(3)(a)17, the amendment requires Kolosso to remain at its existing location while it pursues a determination from the Division under § 218.01(3x) that there is "good cause" to allow Kolosso to undertake its proposal. In many respects, Chrysler benefits from the amendment because it is not exposed to the risk of treble damages or of Kolosso relocating and sharing facilities without Chrysler approval prior to a determination by the Division allowing it to do so, based on consideration of Chrysler's, as well as Kolosso's and the public's, interests.

The Seventh Circuit's decision correctly concluded, therefore, that "the 1993 amendment in effect regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate" and that such change was not "major," but "was rather the sort of fine tuning of the statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship." App. 8a, 9a.

Kolosso agrees with Chrysler that for a retail business "location is critical to success." Petition at 1. This is particularly so where, as here, one location will allow a dealership to share its facilities with another dealership and another location will not. The importance of dealership location, coupled with the Wisconsin Legislature's clear purpose of promoting fair dealing by manufacturers with respect dealer-initiated changes, including facility sharing proposals, made it foreseeable, when the Franchise Agreement was signed, that Chrysler's contractual right to approve the location and use of Kolosso's dealership facility could become subject to a regulation such as § 218.01(3x).

B. The Seventh Circuit's Decision Does Not Conflict With The Eighth Circuit's Decision In *Holiday Inn Franchising*

Notwithstanding the Wisconsin Legislature's previous effort to make a newly-enacted franchise protection law retroactive to preexisting dealerships, *see Wipperfurth v. U-Haul Co. of Western Wisconsin, Inc.*, 101 Wis. 2d 586, 304 N.W.2d 767 (1981), Chrysler contends that the failure of the Wisconsin Legislature to make other franchise regulations expressly retroactive rendered the challenged regulation unforeseeable and that the Seventh Circuit's refusal to so find conflicts with the Eight Circuit's decision in *Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994). App. 1a.

Chrysler fails to note that, in *Holiday Inns Franchising*, Iowa's regulation of the subject industries "prior to the Iowa Franchise Act focused mainly on the delivery of services to the customer, including health and safety concerns . . . and discrimination against employees or customers" and that "[t]he Act, which focuses on the business relationships between franchisors and franchisees, is much different from the type of regulation existing at the time the Act became effective." *McDonald's Corporation v. Nelson*, 822 F. Supp. 597, 606 (S.D. Iowa 1993), affirmed 29 F.3d 383. In discussing previous state franchise legislation in Iowa, the Eighth Circuit was addressing statutes regulating "other franchise arrangements," 29 F.3d at 385, not prior regulation of the same franchise relationships regulated by the statute being challenged in that case.

In *Holiday Inns Franchising*, regulation of the subject franchise relationships prior to the enactment of the subject regulation had been virtually nonexistent. 822

F. Supp. at 607. In this case, prior to the enactment of § 218.01(3x), Wisconsin's regulation of the Franchise Agreement had been pervasive and included the very issues of dealership location and facility sharing that are the subject of the challenged regulation. Where a new body of regulation is created for franchise relationships which have never been previously regulated, it may be reasonable for the franchisors to argue that they could not foresee the regulation coming and that, therefore, the imposition of such regulation to their existing franchise agreements is a "substantial impairment" of those agreements requiring further scrutiny of the State's justification for the regulation. *Energy Reserves*, 459 U.S. at 411. However, where the subject franchise relationship is already regulated, not only generally, but "in the particular to which [the franchisor] now objects," the franchisor cannot reasonably contend that "further legislation upon the same topic" was not foreseeable. *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940).

Here, the Seventh Circuit correctly concluded, in view of the existing provisions of the WMVDL when the Franchise Agreement was signed, that the regulation in question was "the sort of fine tuning of the [existing motor vehicle franchise] statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship." App. 9a. This conclusion does not conflict with the Eighth Circuit's decision in *Holiday Inns Franchising*, which dealt with franchise arrangements that had not been previously regulated by the State. The issue before the Eighth Circuit was whether Iowa's and other states' regulation of *other* franchise

arrangements made the new regulation of previously unregulated arrangements foreseeable. Because the histories of the past regulation of the franchise relationships involved in the Seventh Circuit's decision and in the Eighth Circuit's decision in *Holiday Inns Franchising* were fundamentally different, there is no split in the circuits created by these decisions over when contractual impairments are foreseeable.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

WISCONSIN STATUTES (1985-86)

218.01 Motor vehicle dealers; salesmen; sales finance companies, licenses; fees; regulations; coercion; subsidies; penalties.

(1) DEFINITIONS. In this section, unless the context otherwise requires, the following words and terms shall have the following meanings:

(a) "Agreement" means contract or franchise or any other terminology used to describe the contractual relationship between manufacturers, distributors, importers and dealers.

. . .

(d) "Department" means the department of transportation.

. . .

(k) "Licensor" means the body, either the commissioner or the department or both, issuing a license hereunder.

(l) "Manufacturer" means any person, resident or nonresident who manufactures or assembles motor vehicles or who manufactures or installs on previously assembled truck chassis, special bodies or equipment which when installed form an integral part of the motor vehicle and which constitutes a major manufacturing alteration and which completed unit is owned by such manufacturer.

. . .

(n) "Motor vehicle dealer" means any person, firm or corporation, not excluded by par. (o) who:

1. For commission, money or other thing of value, sells, exchanges, buys, rents with the option of purchase, offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,

2. Is engaged wholly or in part in the business of selling motor vehicles, including motorcycles, whether or not such motor vehicles are owned by such person, firm or corporation.

. . .

(1a) AUTHORITY OF DEPARTMENT AND COMMISSIONER. The department shall issue the licenses provided for in sub. (2) (d) 1 to 6 and have supervision over the licensees thereunder in respect to all the provisions of this section, except only as to such matters as relate to the sale of motor vehicles on retail instalment contracts and the financing and servicing of such contracts, over which matter the commissioner shall have jurisdiction and control, and the commissioner shall issue the licenses to sales finance companies. Either licensor hereunder shall, upon request, furnish the other licensor with any information it may have in respect to any licensee or applicant for license or any transaction in which such licensee or applicant may be a party or be interested. No license shall be issued under sub. (2) (d) 1 and 8 until both licensors have approved the application. The suspension or revocation of either of such licenses shall automatically likewise suspend or revoke the other license; and such suspension or revocation shall be certified by the licensor ordering it to the other licensor.

. . .

(2) LICENSES, HOW GRANTED; AGREEMENTS, FILING. (a) No motor vehicle dealer, motor vehicle salesman or sales finance company shall engage in business as such in this state without a license therefor as provided in this section. If any motor vehicle dealer acts as a motor vehicle salesman he shall secure a motor vehicle salesman's license in addition to a license for motor vehicle dealer. Every motor vehicle dealer shall be responsible for the licensing of every motor vehicle salesman in his employ.

(am) No manufacturer of motor vehicles, or factory branch, or distributor or distributor branch shall engage in business as such in this state without a license therefor as provided in this section.

. . .

(bd)2. Any dealer or distributor discontinued or canceled may within such 60-day notice period, file with the department and office of the commissioner of transportation and serve upon the respondent a complaint for a determination of unfair discontinuation or cancellation under sub. (3) (a) 17. Allowing opportunity for an answer, the office of the commissioner of transportation shall thereafter schedule a hearing on and decide the matter. Agreements and certificates of appointment shall continue in effect until final determination of the issues raised in such complaint. If the complainant prevails he or she shall have a cause of action against the defendant for reasonable expenses and attorney's fees incurred by him or her in such matter.

3. No manufacturers', distributors' or importers' vehicles shall be sold in this state unless either the

manufacturer on direct dealerships of domestic vehicles, the importer of foreign manufactured vehicles on direct dealerships or the distributor on indirect dealerships of either domestic or foreign vehicles are licensed under s. 218.01. The obtaining of a license under s. 218.01 shall conclusively establish that such manufacturer, distributor or importer is doing business in this state and shall subject the licensee to all provisions of the Wisconsin statutes regulating manufacturers, importers and distributors.

. . .

(c)2. a. In cases where a complaint of unfair cancellation of a dealer agreement is in the process of being heard, no replacement application for the agreement may be considered until a decision is rendered by the office of the commissioner of transportation.

b. In cases where a complaint has been filed under sub. (3) (f) protesting the proposed establishment or relocation of a dealership in a relevant market area, no license may be issued until the office of the commissioner of transportation has rendered a decision permitting the issuance of the license.

(d) The license fee for each calendar year, or part thereof, shall be:

1. For motor vehicle dealers, $20 for each office or branch thereof, plus $1 for a supplemental license for each used motor vehicle lot within the same municipality, but not immediately adjacent to the office or to a branch.

2. For motor vehicle manufacturers, $20; and for each factory branch in this state, $20.

. . .

(e) The licenses of dealers, manufacturers, factory branches, distributors, distributor branches and sales finance companies shall specify the location of the office or branch and must be conspicuously displayed there. In case such location be changed, the licensor shall indorse the change of location on the license without charge if it be within the same municipality. A change of location to another municipality shall require a new license, except for sales finance companies.

. . .

(2a) CHANGES IN PLACES OF BUSINESS TO BE REPORTED. (a) Before changing the location of a place of business or opening a new place of business in a municipality in which authorized to do business, a licensed dealer, distributor, or manufacturer shall apply to the department for an amended license. The department shall issue such license without charge.

. . .

(3) LICENSES, HOW DENIED, SUSPENDED OR REVOKED. (a) A license may be denied, suspended or revoked on the following grounds:

. . .

4. Wilful failure to comply with any provision of this section or any rule or regulation promulgated by the licensor under this section.

. . .

11. Having indulged in any unconscionable practice relating to said business.

. . .

14. Having violated any law relating to the sale, distribution or financing of motor vehicles.

15. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has induced or coerced or attempted to induce or coerce any motor vehicle dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities which shall not have been ordered by said dealer.

16. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has attempted to induce or coerce, or has induced or coerced, any motor vehicle dealer to enter into any agreement with such manufacturer, factory branch or representative thereof, or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch or representative thereof and said dealer.

17. Being a manufacturer, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has unfairly, without due regard to the equities of said dealer and without just provocation, canceled or failed to renew the franchise of any motor vehicle dealer, or being a manufacturer, factory branch or importer, who unfairly, without due regard to the equities of a distributor and without just provocation, canceled or failed to renew the franchise of any

distributor. All existing dealers' franchises shall continue in full force and operation under a newly appointed distributor on the termination of an existing distributor unless a mutual agreement of cancellation is filed with the department between the newly appointed distributor and such dealer.

. . .

23. Being a manufacturer, factory branch or distributor who unreasonably withholds its approval of a change of ownership or executive management of a dealership.

24. Being a manufacturer, factory branch or distributor who unreasonably closes a dealer point.

. . .

26. Being a manufacturer, factory branch, distributor, field representative, officer, agent or any representative of such manufacturer, factory branch or distributor who, notwithstanding the terms of any agreement, refuses to honor the succession to the ownership or operation of a dealership under an existing franchise agreement by a designated family member of a deceased or incapacitated dealer, except in the manner prescribed by sub. (3c), or who unreasonably withholds its approval of a change of ownership or executive management of the dealership after the dealer's death or incapacity.

26m. Being a manufacturer, factory branch or distributor who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises.

. . .

32. Being a manufacturer, factory branch or distributor who enters into a franchise agreement establishing or relocating a motor vehicle dealership in a relevant market area without first complying with the procedure in par. (f) 1.

. . .

(bf) 1. The department shall not license as a dealer an applicant for the sale of motor vehicles at retail unless such applicant owns or leases a vehicle display lot and a permanent building wherein there are facilities to display automobiles and motorcycles and facilities to repair functional and nonfunctional parts of motor vehicles and where replacement parts, repair tools and equipment to service motor vehicles are kept, and at which place of business shall be kept and maintained the books, records and files necessary to conduct the business. A residence, tent or temporary stand is not a sufficiently permanent place of business within the meaning of this paragraph.

. . .

(f) 1. A manufacturer, factory branch or distributor who seeks to enter into a franchise agreement establishing or relocating a motor vehicle dealership within the relevant market area of an existing enfranchised dealer of the line make of motor vehicle shall first notify in writing the department and each such existing enfranchised dealer of its intention to establish or relocate a dealership. Within 30 days of receiving the notice or within 30 days after the end of any appeal procedure provided by the manufacturer, factory branch or distributor, whichever is later, any existing enfran-

chised dealer of the same line make to whom the manufacturer, factory branch or distributor is required to give notice under this subdivision may file with the department and the office of the commissioner of transportation a complaint protesting the proposed establishment or relocation of the dealership within the relevant market area of the existing enfranchised dealer. If a complaint is filed, the department shall inform the manufacturer, factory branch or distributor that a timely complaint has been filed, that a hearing is required, and that the proposed franchise agreement may not be entered into until the office of the commissioner of transportation has held a hearing, nor thereafter, if the office of the commissioner of transportation determines that there is good cause for not permitting the proposed establishment or relocation of the dealership. In the event of multiple complaints, hearings shall be consolidated to expedite the disposition of the issue.

2. In determining whether good cause exists for not permitting the proposed establishment or relocation of a dealership, the office of the commissioner of transportation shall take into consideration the existing circumstances, including, but not limited to:

a. The amount of business transacted by existing enfranchised dealers of the line make of motor vehicle when compared with the amount of business available to them.

b. The permanency of the investment necessarily made and the obligations incurred by existing enfranchised dealers in the performance of their franchise agreements.

c. The effect on the retail motor vehicle business in the relevant market area.

d. Whether it is injurious to the public welfare for the proposed dealership to be established or relocated.

e. Whether the establishment or relocation of the proposed dealership would increase competition and therefore be in the public interest.

f. Whether the existing enfranchised dealers of the line make of motor vehicle are providing adequate consumer care for the motor vehicles of that line make, including the adequacy of motor vehicle service facilities, equipment, supply of parts and qualified personnel.

g. Whether the existing enfranchised dealers of the line make of motor vehicle are receiving vehicles and parts in quantities promised by the manufacturer, factory branch or distributor and on which promised quantities existing enfranchised dealers based their investment and scope of operations.

h. The effect the denial of such establishment or relocation would have on the license applicant or dealer who is seeking to establish or relocate a dealership.

3. The decision of the office of the commissioner of transportation shall be in writing and shall contain findings of fact and a determination of whether there is good cause for not permitting the proposed establishment or relocation of the dealership. The office of the commissioner of transportation shall deliver copies of the decision to the parties personally or by registered mail. The decision is final upon its delivery or mailing and no reconsideration or rehearing by the office of the commissioner of transportation is permitted.

4. For purposes of this paragraph:

a. The reopening of a dealership, which has been closed for less than 2 years, at the original location is not the establishment or relocation of a motor vehicle dealership. The reopening of a dealership at a location other than the original location is the establishment or relocation of a motor vehicle dealership if the new location is within 6 miles, by the closest highway route, of another enfranchised dealer of the same line make and is closer to such dealer than the reopening dealer's closed dealership.

b. The relocation of an enfranchised dealership to a location within the existing area of sales responsibility assigned to that enfranchised dealership by the manufacturer, factory branch or distributor is not the relocation of a dealership, unless the relocation site is within 6 miles, by the closest highway route, of the location of another enfranchised dealer of the same line make and is closer to such dealer than the relocating dealer's existing location.

. . .

(h) In addition to the licensor's authority to deny, suspend or revoke a license under this section, the commissioner, after public hearing, may issue a special order enjoining any licensee from engaging in any act or practice which is determined by the commissioner to be in violation of any provision of par. (a), and the office of the commissioner of transportation may be petitioned to issue such a special order after notice and hearing thereon.

. . .

(3c) FAMILY MEMBER'S RIGHT TO SUCCEED DECEASED OR INCAPACITATED DEALER UNDER EXISTING FRANCHISE

AGREEMENT. (a) The term "designated family member", as used in this subsection and in sub. (3) (a) 26, means the spouse, child, grandchild, parent, brother or sister of a dealer who, in the case of a deceased dealer, is entitled to inherit the dealer's ownership interest in the dealership under the terms of the dealer's will or under the laws of intestate succession of this state, or who, in the case of an incapacitated dealer, has been appointed by a court as the legal representative of the dealer's property. The term "designated family member" shall also mean and include the duly appointed and qualified personal representative and the testamentary trustee of a deceased dealer.

(b) Any designated family member of a deceased or incapacitated dealer shall have the right to succeed such dealer in the ownership or operation of the dealership under the existing franchise agreement provided the designated family member gives the manufacturer, factory branch or distributor written notice of his or her intention to do so within 120 days of the dealer's death or incapacity and unless there exists good cause for refusal to honor such succession on the part of the manufacturer, factory branch or distributor. The manufacturer, factory branch or distributor may request, and the designated family member shall provide, such personal and financial data as is reasonably necessary to determine whether the succession should be honored.

(c) If a manufacturer, factory branch or distributor believes it has good cause for refusing to honor the succession to the ownership and operation of a dealership by a family member of a deceased or incapacitated dealer under the existing franchise agreement, such

manufacturer, factory branch or distributor may, within 30 days of receipt of notice of the designated family member's intent to succeed the dealer in the ownership and operation of the dealership, serve upon such designated family member and the department notice of its refusal to honor the succession and of its intent to discontinue the existing franchise agreement with the dealership no sooner than 60 days from the date such notice is served. Such notice shall state the specific grounds for the refusal to honor the succession and the discontinuance of the franchise agreement. If no notice of such refusal and discontinuance is timely served upon the family member and department, or if the office of the commissioner of transportation rules in favor of the complainant in a hearing held under par. (d), the franchise agreement shall continue in effect subject to termination only in the manner prescribed in this subchapter.

(d) Any designated family member who receives a notice of the manufacturer's, factory branch's or distributor's refusal to honor his or her succession to the ownership and operation of the dealership may within the 60-day notice period, serve on the respondent and file in triplicate with the office of the commissioner of transportation a verified complaint for a hearing and determination by the office of the commissioner of transportation on whether good cause exists for such refusal and discontinuance. The office of the commissioner of transportation shall forward a copy of the complaint to the department. The manufacturer, factory branch or distributor shall have the burden of establishing good cause for such refusal by showing that the succession would be detrimental to the public interest

or to the representation of the manufacturer, factory branch or distributor. The franchise agreement shall continue in effect until the final determination of the issues raised in such complaint. If the complainant prevails he or she shall have a cause of action against the defendant for reasonable expenses and attorney's fees incurred in such matter. If the manufacturer, factory branch or distributor prevails, the office of the commissioner of transportation shall include in its order approving the termination of the franchise agreement such conditions as are reasonable and adequate to afford the complainant an opportunity to receive fair and reasonable compensation for the value of the dealership.

(e) Nothing in this subsection shall prevent a dealer, during the dealer's lifetime, from designating any person as his or her successor dealer by written instrument filed with the manufacturer, factory branch or distributor.

. . .

(5) RULES AND REGULATIONS. (a) The licensor shall promote the interests of retail buyers of motor vehicles relating to default, delinquency, repossession or collection charges and the refund of the finance charge and insurance premium on prepayment of the instalment contract. It may define unfair practices in the motor vehicle industry and trade between licensees or between any licensees and retail buyers of motor vehicles, but may not limit the price at which licensees may sell, assign or transfer receivables, contracts or other evidence of any obligation arising out of an instalment sale made under this section.

(c) The licensor may make such rules and regulations as it shall deem necessary or proper for the effective administration and enforcement of this section, but no licensee shall be subject to examination or audit by the licensor except as provided in sub. (3) (d).

. . .

(9) CIVIL DAMAGES. (a) Any licensee suffering pecuniary loss because of a violation by any other licensee of sub. (3) (a) 4, 11, 15, 16, 17, 23, 24, 26, 32 or 35 or because of any unfair practice found by the commissioner or office of the commissioner of transportation under sub. (5) (a) may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss together with costs including a reasonable attorney fee.